Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

JO MINOR,

Petitioner,

v.

PRUDENTIAL SECURITIES, INC. and PATRICE MACKIE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

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44 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Federal Arbitration Act - which provides that "the United States court in and for the district wherein the award was made may make an order vacating the award" -- means instead that the United States court may *only* make such an order in diversity cases and never in arbitrations resolving federal questions -- a distinction found nowhere in any language or policy of the enactment and contrary to its specific import?

2. Whether when Congress enacted the Federal Arbitration Act in 1925 it intended -- by uniform language granting the "United States courts" jurisdiction to enforce and review arbitrations -- to instead only grant federal courts power in federal question cases to *compel* arbitration and deny them power to *review* those same cases after arbitration, while simultaneously in diversity cases granting the federal courts power both to compel *and review* arbitrations? Does the Seventh Circuit's holding to this effect conflict with other Circuits and sow utter confusion?

PARTIES TO THE PROCEEDING AND RULE 29.1 LIST

The caption of the case in this court contains the names of all the parties to this proceeding.

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OPINIONS BELOW

The opinion of the Seventh Circuit (App. 1A)[1] is presently unreported, as is the opinion by the district court (App. 9A).

JURISDICTION

The judgment of the Court of Appeals was entered on September 4, 1996 (App. 1A). No petition for rehearing was filed. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1)(1994).

STATUTE INVOLVED

The statute involved here is Section 10(a) of the Federal Arbitration Act ("the Act"), and related sections, 9 U.S.C. 1 et seq. Section 10(a) is set forth below and the entirety of the Act is set forth in the Appendix at App.17A .

Section 10(a):

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or

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[1] References to "App." are to the Appendix submitted with this petition.

in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

STATEMENT OF THE CASE

Petitioner, a widow in her seventies and brokerage customer of defendant Prudential Securities, Inc. ("Prudential") and its retail broker defendant Mackie ("Mackie"), filed a complaint alleging several unauthorized trades in her account, as well as misleading statements as to safety and security causing her to invest in speculative stocks which promptly crashed. In support of these claims, she alleged a pattern of falsity including the actual forgery of her signature on one of the defendants' customer agreements, and she offered the unimpeached testimony of a highly regarded handwriting expert to that effect.

Because of a standard clause in one of her brokerage agreement forms, she was forced to file her complaint as an NASD arbitration instead of in federal court in Chicago, where (because of the existence of claims under Section 10(b) of the Securities Exchange Act of 1934 and RICO) it would otherwise have been filed.

As set out in her Motion to Vacate Arbitration Award, the dismissal of which for lack of federal subject matter jurisdiction is the issue in this petition, instead of defending on the merits, defendants chose to try this case by creating false testimony, particularly concerning the forgery. First they engaged a highly regarded handwriting expert, falsely submitting to him as "unknown" exemplars key documents known by them to have

been written by defendant Mackie. When this expert nonetheless pointed his finger at them, defendants "disappeared" this expert and, using the subterfuge of hiring a co-counsel for defendant Mackie, employed on the day before trial a former Chicago patrolman as their expert. This gentleman testified falsely that the documents he examined could not conclusively show Mackie as the forger (neglecting to inform the panel that he excluded the incriminating documents from what he was showing them). This perjured testimony resulted directly in the adverse award and was cited by the panel as what it relied upon.

Plaintiff's position is straightforward. She has compelling federal claims which she was forced to arbitrate and which were given short shrift in a proceeding corrupted by defendants. Section 10 of the Act expressly provides for redress by motion to the "United States court" for the district of the award. She did this, and was turned away on the specious theory that the Act provides no federal subject matter jurisdiction regarding her underlying federal claims, although if hers were a diversity case such jurisdiction would lie. Nothing in the language or history of the Act supports this distinction, or this refusal by a federal court to vindicate the federal interest in her underlying federal claims or to protect her from the corruption of legal process this case reveals.

SUMMARY OF ARGUMENT

When Congress enacted the Federal Arbitration Act in 1925, it spoke expressly and exclusively of the power of "the United States court" to enforce arbitrations, and to confirm, vacate or modify awards. Until this Court so held in 1983, it was unclear whether the Act applied at all in the state courts, or whether (given the question whether the Act applied to the states) state rules inconsistent with the Act were valid. In then resolving these questions, this Court also indicated in a footnote that the Act's express and exclusive references to "the United States courts" did

not provide a basis for federal jurisdiction where such jurisdiction would not otherwise exist:

> "The Arbitration Act is something of an anomaly in the field of federal court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create an independent federal-question jurisdiction under 28 U.S.C. 1331 or otherwise."

Moses H. Cone Hospital v. Mercury Construction Co., 460 U.S. 1, 25 n.32 (1983).

This mandate to inquire whether federal jurisdiction would otherwise exist to support federal court enforcement or review of arbitrations is at the heart of this appeal. How do you tell whether federal jurisdiction otherwise would exist?

Respondents argued, and the district and 7th Circuit held, that, when it comes to confirming, vacating or modifying awards, the court can only look at the actual motion to vacate to see if it raises an independent federal question, and cannot look at the underlying complaint in arbitration, although examining the underlying complaint is exactly what the court must do under the Act when asked (1) to enforce arbitration in the initial instance (Act, at sec. 3, 4, 8), and also (2) to stay confirmation pending a motion to vacate or modify (Act, at sec. 12). What appears to have induced this anomalous result was a misinformed analogy to the "well-pleaded complaint" rule, which has no application under the motion procedure set up in the Act (Act, sec. 6, 12; F.R.Civ.P. 81(a)(3)) or the sensible, harmonious construction of its various parts. Indeed, proper application of the "well-pleaded complaint" rule would lead to the opposite result because in removal cases the "well-pleaded complaint" rule looks not to the removal petition (the analogy to the motion to vacate or confirm here) but to the underlying claim filed in state court to see if it supports jurisdiction in the federal court.

The Seventh Circuit's approach conflicts with the construction of the Act by the Sixth Circuit and creates, without warrant in the Act or anything in the United States Code or Federal Rules, a confused hodge-podge of jurisdictional traps and differences under varying provisions of the Act which it is simply inconceivable that Congress in 1925 could possibly have considered, or considered proper. How can a federal statute which for forty years was not even applied or considered applicable in state courts now be construed (contrary to its express language and obvious implication) to exclude from federal court and relegate to state courts all federal question cases - the very cases which motivated Congress to enact the Act in the first place and in which the federal interest under the Act is paramount?

Petitioner asks for her day in court, in the "United States court" for the district of the award, to vindicate the federal interest in the federal claims violated and subverted by respondents' corruption of her hearing.

ARGUMENT

I. The Seventh Circuit's View that the Act's language "the United States court may make an order" really means "the United States court may *not* make an order" is based upon clear error of logic, language and history.

Any laymen would be bemused at the stark reversal of language and logic displayed by the Seventh Circuit here; only a lawyer, they say, can turn a direct statement into its opposite. It is sophistry of this sort which lowers the public esteem of the profession and courts and which this Court should correct here.

The argument that the federal courts lack subject matter jurisdiction over arbitrated federal claims not only defies language, it defies logic. Such a view assumes that Congress, in passing the FAA, decided to distinguish between (and

discriminate against) those claimants asserting the violation of *federal* rights, who will *not* be given a federal forum, and those claimants asserting *state* claims but who happen to be of diverse citizenship, who *will*. On the face of it, this appears to be an absurd and unlikely proposition. Especially so because the Act speaks only of the "United States courts" and if those courts lack jurisdiction over a large class of cases, to what courts were those cases intended to go? Presumably nowhere. But Congress can not be presumed to have enacted such a nullity.

Instead, demonstration of Congressional intent to so reverse the normal assumption that federal courts exist to vindicate and protect federal interests should be quite convincing, and its existence not presumed as it was by the courts below. As one authority explains, "federal question jurisdiction was one of the principal reasons that the Constitution authorized Congress to create a system of inferior federal courts." Wright, Miller & Cooper, *13B Federal Practice and Procedure*, Section 3561, p.2 (2d ed. 1984).

A. The Provisions of the Act show a harmonious and unified concept of federal jurisdiction contrary to the interpretation below.

Sections 3, 4, and 8 of the Act set out how to find whether federal jurisdiction exists regarding arbitration issues. The concept is simple, consistent with removal and "well-pleaded complaint" standards, and express: *"save for"* the arbitration agreement would the federal court have jurisdiction over the case.[2] These sections deal with *pre-arbitration* orders enforcing

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[2] Section 3 of the Act assumes federal jurisdiction because it provides power to the federal district court to stay a case already before it. Section 4 allows any federal district court to order arbitration wherever "save for such agreement [to arbitrate] [it] would have jurisdiction". Section 7 provides for subpoenas and

(continued...)

the parties' contract. This design leaves the review of most arbitrations to state court. The federal courts are involved only where they would otherwise be involved without the agreement to arbitrate. The FAA has achieved its principal intent - to validate arbitration agreements without otherwise disturbing the structure of the laws. 9 U.S.C. Sect. 2; *Allied-Bruce Terminix Cos v. Dobson*, 513 U.S. __, 130 L.Ed 2d 753, 762, 767, 115 S.Ct ___ (1995)("the basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate.").

Sections 9, 10, 11 and 12 address the question of what the courts do *after* the arbitration has resulted in an award. They do not contain the express "save for" language found in Section 4 and 8 and inherent in Section 3, speaking instead just in terms of the power of "the United States court". But unless something in the language of the FAA or its legislative history reveals an intention to treat post-arbitration matters differently, the provisions of the Act should be read together, as the inference inevitably is that Congress intended a unitary, consistent approach under the Act. A hodge-podge of different, inconsistent rules, providing fertile ground for endless litigation and uncertainty, is not to be presumed.

2(...continued)
allows the district court to compel appearance and punish for contempt upon "petition". Section 8 allows proceedings to begin by seizure in admiralty cases, with the federal court retaining jurisdiction to enter its decree upon the award. Section 9 allows the parties to specify a court for enforcement of an award, or, in default thereof, to apply to the "United States court" for the district. Section 10 allows "the United States court" for the district to vacate awards upon specified grounds. Section 11 similarly allows for modifying or correction awards. Section 12 allows a court originally able to stay to permit arbitration to stay enforcement after award. See App. 17A .

Indeed, Section 12 of the Act, which also applies post-award, explicitly empowers the federal judge to stay confirmations of awards wherever he or she could have stayed pre-award proceedings under Sections 3, 4 and 8. This shows clearly that no distinction between pre-and post-award was intended, and that anything other than the simple, single standard which the Act's language, structure and logic suggests would render it hopelessly complex and a minefield of endless litigation - "unnecessarily complicating the law and breeding litigation from a statute that seeks to avoid it." *Allied-Bruce Terminix Cos v Dobson*, 513 U.S. , 115 S.Ct., 130 L.Ed.2d 753, 765 (1995).

B. The Sixth and Second Circuits follow the course rejected by the Seventh Circuit here.

The Sixth Circuit in *Ford v. Hamilton Investments*, 29 F.3d 255, 258 (1994), compared the various provisions of the Act and held that a single, harmonious interpretation was intended:

> Section 4 of the Federal Arbitration Act, which says that a party to an agreement to arbitrate may seek an enforcement order from a federal district court "which, save for such agreement, would have jurisdiction under title 28", obviously contemplates that "there must be diversity of citizenship or some other independent basis for federal jurisdiction before the order can issue." *Mercury Constr.*, 460 U.S. at 25 n.32, 103 S.Ct. at 942 n.32. Sections 9 and 10 of the Arbitration Act contemplate the same thing.

The Second Circuit in *Harry Hoffman Printing v. Graphic Com.*, 912 F.2d 608, 611 n.1 (1990), found the Act to present a unitary concept of federal subject matter jurisdiction, and that the approach taken by the Seventh Circuit would be wrong:

> [I]t would be anomalous to conclude, for example, that section 4 confers no jurisdiction to compel arbitration,

but that section 10 confers jurisdiction to vacate an award once arbitration has taken place.

Even the Seventh Circuit itself, in an earlier opinion by Judge Posner, rejected the approach taken below:

> "Although section 9 does not refer to any jurisdictional requirements for enforcing arbitration awards, other than the award itself, we may assume, following Wright and Miller, that the jurisdictional requirements for other proceedings under the Arbitration Act, see, e.g., 9 U.S.C. Section 4, are applicable to section 9 proceedings too. See 13B Wright, Miller & Cooper, *Federal Practice and Procedure* Section 3569, at pp. 171-72 (2d ed. 1984).

Comprehensive Accounting Corp. v. Rudell, 760 F.2d 138, (7th Cir. 1985).

Thus there appears to be a split in the circuits on the approach to be taken. This Court should take this case and resolve the differences.[3]

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[3] The Fifth Circuit appears to have fallen into the same conceptual trap as the Seventh in *Prudential-Bache Securities v. Fitch*, 966 F.2d 981, 989 (5th Cir. 1992), in which the respondent here argued the opposite side from its position below, and lost. Although the Fifth Circuit also misapplied the "well-pleaded complaint" rule, in *Fitch* by the time the case was in federal court there was no longer any basis for federal jurisdiction "save for" the arbitration, since Prudential had failed to comply with the strict time limits for removal and had thus waived its claim to federal jurisdiction. Consistent with Petitioner's view, the *Fitch* court indicated that had this waiver not occurred, federal jurisdiction would have existed to compel arbitration.

C. The "Well-Pleaded Complaint" Rule Is Inapplicable or only Confirms Federal Jurisdiction Here.

The courts below reasoned that they lack subject matter jurisdiction here because the "well-pleaded complaint" rule requires them to only look at the initial paper filed in federal court to see if a federal question is raised in it or if diversity or admiralty requirements are met. Since it has been held that the exclusive grounds for review of arbitration set out in Section 10 of the Act do not themselves supply federal question jurisdiction (*Moses H. Cone Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 25 n.32 (1983)), this approach means that in federal question cases the court finds no jurisdiction exists, while in diversity and admiralty cases it finds jurisdiction does exist, since in the latter cases the party can simply describe the relevant jurisdictional circumstances.

This approach is based upon a fundamental misunderstanding both of the structure of the Act and related Federal Rules of Civil Procedure, and of the true content of the "well-pleaded complaint" rule. The "well-pleaded complaint" rule has two aspects: (1) in judging the existence of federal jurisdiction for a normal civil action, the court does not look to the answer or anticipated defenses, but looks just to the complaint, and (2) the court disregards "surplusage" unnecessary for the statement of the claim. Wright, Miller & Cooper, 13B *Federal Practice & Procedure*, Section 3566 at pp. 83-84, 87 (2d ed. 1984).

First of all, although most other filings in federal court must be by "complaint" under Rule 3, F. R. Civ. P., review of arbitration is specially excepted. Rule 81 (a)(3) of the Federal Rules of Civil Procedure gives express deference to the procedural rules in the Act. The Act specifically states that the initial filing in court is a "motion", not a complaint, and provides for service as for any other motion. 9 U.S.C. Section 6, 12. This is to provide for an expedited procedure, and was clearly intended to make the procedure in court - whether to enforce arbitration in the initial instance or to confirm, vacate or modify

an award - a continuation of the underlying complaint in the arbitration proceeding. Thus to apply the "well-pleaded complaint" rule to this motion procedure is to misapply the doctrine from the start.

Secondly, where the question is whether a state complaint can be removed to federal court, a context analogous to review of arbitrations, the "well-pleaded complaint" rule requires the federal court to examine not the petition for removal, as respondents logic would suggest, but the underlying state complaint sought to be removed. See e.g., *Franchise Tax Board v. Laborers' Vac. Trust,* 463 U.S. 1 (1983). Just as with arbitrations, the relevant source for federal jurisdiction is the "complaint" not the motion used to bring that complaint before he court. The "well-pleaded complaint" rule, insofar as it applies at all, dictates the opposite result from that found below. Respondents and the courts below turn the law upside down.

D. The Plain Meaning of the Act Requires Reversal.

Finding a unitary concept of subject matter jurisdiction harmonizes the Act's various provisions and provides needed clarity. It also follows the ordinary meaning of the words in the statute, without creating arcane distinctions which become only expensive traps for the unwary, like the alternative adopted by the courts below would do. *Perrin v. United States*, 444 U.S. 37, 42 (1979)(words not defined in a statute should be given their ordinary and common meaning); *Smith v. United States*, 508 U.S. ,113 S.Ct. 2050, 124 L.Ed 2d 138(1993)(same). The question asked in all cases is whether, "save for the agreement", federal jurisdiction would lie. The Seventh Circuit's approach conflicts with that of other circuits, violates the language, logic and history of the Act, and creates only confusion for the practitioner.

II. Conclusion

For the above reasons, Petitioner requests this petition be granted, and the decision below reversed.

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In the
United States Court of Appeals
For the Seventh Circuit

No. 96-1180

JO MINOR,

Plaintiff-Appellant,

v.

PRUDENTIAL SECURITIES, INC. and PATRICE MACKIE,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 2938—Brian Barnett Duff, *Judge.*

ARGUED MAY 31, 1996—DECIDED SEPTEMBER 4, 1996

Before BAUER, FLAUM, and KANNE, *Circuit Judges.*

FLAUM, *Circuit Judge.* Plaintiff, Jo Minor, filed a motion in district court to vacate an arbitration decision pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10. The arbitrator had ruled in favor of defendants, Prudential Securities and broker Patrice Mackie (collectively "Prudential") on Minor's various claims arising from a series of stock investments. The district court dismissed her motion to vacate for lack of subject matter jurisdiction. We affirm.

I.

In November of 1991, Prudential made a series of stock investments for Minor. Minor claims that Prudential misrepresented to her that certain of these investments were "safe," when in reality they were very high risk. Minor also claims that while she was a Prudential customer, Prudential effected at least one unauthorized trade in her account and forged her signature on a customer agreement. Minor maintains that as a result of these acts, she lost $17,797.86. In order to recover her losses, Minor filed a claim in arbitration before the National Association of Securities Dealers, Inc. ("NASD"). Minor and Prudential were subject to a pre-dispute arbitration agreement, contained in Minor's securities account agreement with Prudential. Minor's complaint consisted of nine counts: 1) breach of fiduciary relations; 2) breach of contract; 3) fraud; 4) constructive fraud; 5) lack of due care in performing a contract; 7) a violation of the Securities Act of 1934; 8) use of racketeering income to operate an enterprise, in violation of 18 U.S.C. § 1962(a); and 9) indirect participation in the conduct of a racketeering enterprise's affairs, in violation of 18 U.S.C. § 1962(c).

Arbitration hearings were held in December of 1994 and January of 1995. In the midst of the proceedings, a discovery dispute arose concerning one of Prudential's handwriting experts. Minor alleged that Prudential was attempting to conceal a negative report by switching their handwriting expert one day prior to the hearing. The Chairman of the Arbitration Panel held a conference on the issue and determined that Minor was entitled to a copy of the previous expert's report, but not to all of the materials surrounding the hiring of the two experts, as Minor had requested. At the conclusion of the hearing, the Arbitration Panel first found that Minor had withdrawn her RICO claims and then entered an award denying each of Minor's remaining claims. Displeased with the decision, Minor requested a statement of reasons from the Panel. On April 18, 1995, the Panel provided Minor with such a statement.

Minor then proceeded to file her "Motion to Vacate Arbitration Award" in the district court, pursuant to § 10 of the FAA. 9 U.S.C. § 10. In her motion, Minor claims that the arbitration award should be vacated because 1) it was procured by "corruption, fraud, or undue means," 2) the panel refused to hear evidence pertinent and material to the controversy, 3) there was "evident partiality" in the panel, and 4) the award was imperfectly executed because the panel wrongly stated that she had withdrawn her RICO counts. The district court dismissed the motion, finding a lack of subject matter jurisdiction, as the parties are not diverse and the motion to vacate presents no federal question.

II.

It is now well established that § 10 of the FAA does not constitute a grant of subject matter jurisdiction.[1] There must be an independent basis of federal jurisdiction before a district court can entertain a motion to vacate under that section. *See Garrett v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 882, 883-84 (9th Cir.

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[1] Section 10(a) of the FAA provides:

> In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

1993); *Ford v. Hamilton Investments, Inc.*, 29 F.3d 255, 257 (6th Cir. 1994); *Harry Hoffman Printing v. Graphic Communications Local 261*, 912 F.2d 608, 611 (2d Cir. 1990); *Giangrande v. Shearson Lehman/E.F. Hutton*, 803 F. Supp. 464, 466 (D. Mass. 1992). The petitioning party must demonstrate that diversity or federal question jurisdiction exists. This follows from several Supreme Court cases, which have explained:

> The Arbitration Act is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 or otherwise .... [T]here must be diversity of citizenship or some other independent basis for federal jurisdiction . . . [for] enforcement of the Act is left in large part to the state courts.

Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n. 32 (1983) (internal citations omitted); *see also Southland Corp. v. Keating*, 465 U.S. 1, 15 n. 9 (1984) ("While the Federal Arbitration Act creates federal substantive law requiring the parties to honor arbitration agreements, it does not create any independent federal-question jurisdiction. . . ."). Thus the fact that Minor relies on the standards of review set forth in § 10 of the FAA to bring her motion to vacate is insufficient to establish federal court jurisdiction.

In this case, Minor attempts to invoke federal question jurisdiction, as it is undisputed that no diversity of citizenship exists between the parties. It is standard learning that federal question jurisdiction arises only when the complaint standing alone "establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983); *see also Phillips Petroleum Co. v. Texaco, Inc.*,

415 U.S. 125, 127-28 (1974) (federal question "must be disclosed upon the face of the complaint, unaided by the answer"). Looking to the face of Minor's motion to vacate, Minor asserts that federal jurisdiction is firmly grounded on the Securities Exchange Act of 1934 and on RICO. However, mere incantation of a federal statute does not confer jurisdiction; rather the dispute must actually involve a "substantial question of federal law." *See Franchise Tax Bd.*, 463 U.S. at 28; Ford, 29 F.3d at 258. It is clear that Minor's motion to vacate on the grounds of fraud, corruption, undue means, evident partiality, and failure to consider pertinent and material evidence, does not require the resolution of any federal issue, let alone a "substantial question of federal law." In addressing Minor's motion, the district court would not be called upon to decide any issue of federal law, whether related to the Securities Act or RICO. Minor's motion essentially alleges a claim of fraud in the discovery process. Minor failed to raise any federal question before the district court, and the court therefore lacked subject matter jurisdiction over the motion to vacate.

Minor quarrels with this analysis, arguing that we should look not to her motion to vacate for a jurisdictional ground, but rather to the underlying dispute in arbitration, which clearly involves claims under the Securities Act and RICO.[2] She basically asserts two justifications for this position. First, Minor maintains that if we restrict our search for jurisdiction to the actual motion in federal court, we will create a "topsy-turvy universe" in which claimants who

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[2] We note that the other circuit courts to consider federal jurisdiction in connection with motions to vacate under § 10 have not directly addressed the impact of an underlying federal question claim. In *Garrett*, 7 F.3d at 883, and *Ford*, 29 F.3d at 258-59, the underlying complaints were based on state law. The *Ford* court did note, however, that "[e]ven if a violation of federal securities law had been claimed to be involved in some way, jurisdiction to vacate the arbitration award would not necessarily have existed." *Id.* at 259 n. 5.

have asserted violations of federal rights are "relegated" to state court for post-arbitration proceedings, while claimants who have asserted state law violations who happen to satisfy diversity requirements are afforded a post-arbitration federal forum. This would be a strong argument if in fact Minor had asserted a violation of federal law and we were directing her to state court. But since § 10 of the FAA does not create a federal issue, Minor has essentially come to district court only with a claim of fraud, which is generally entrusted to state court unless the parties are diverse. Thus our approach is consistent with the normal state of the jurisdictional universe. If Minor's motion to vacate somehow involved the resolution of her federal claims or some question of federal law, then under the preceding analysis the district court would have jurisdiction.

Minor also asserts that the federal character of the underlying claims is sufficient to establish jurisdiction for purposes of § 10 because it is a sufficient jurisdictional basis for purposes of § 4 of the FAA:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration *may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties*, for an order directing that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. § 4 (emphasis added). Minor therefore argues that it would be inconsistent and anomalous for parties to be able to obtain a motion to compel from a district court, based on the federal nature of the underlying dispute, but not be able to seek a motion to vacate or confirm (9 U.S.C. § 9) on the same basis.

The text of § 4 does appear to confer jurisdiction on federal courts to issue motions to compel in cases where the court would have jurisdiction over the underlying claims; and the Supreme Court has used language that could be

interpreted as implying the same: "Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute. . . ." *Moses H. Cone*, 460 U.S. at 25 n. 32. A strong body of caselaw has developed, however, holding that the nature of the underlying dispute is irrelevant for purposes of subject matter jurisdiction, even on a motion to compel under § 4, i.e., the *motion* itself must invoke diversity or federal question jurisdiction. *See Prudential-Bache Securities, Inc. v. Fitch*, 966 F.2d 981, 986-88 (5th Cir. 1992); *Drexel Burnham Lambert, Inc. v. Valenzuela Bock*, 696 F. Supp. 957, 960-64 (S.D.N.Y. 1988); *Klein v. Drexel Burnham Lambert, Inc.*, 737 F. Supp. 319, 322-24 (E.D. Pa. 1990); *Kaplan v. Dean Witter Reynolds, Inc.*, 896 F. Supp. 1219, 1221 (S.D. Fla. 1995); *In re Prudential Securities, Inc.*, 795 F. Supp. 657, 660-62 (S.D.N.Y 1992); *Giangrande v. Shearson Lehman/E.F. Hutton*, 803 F. Supp. 464, 469-73 (D. Mass. 1992). We need not decide whether federal question jurisdiction for purposes of a motion to compel under § 4 can be derived from the underlying dispute in order to resolve this case, because even assuming that this is so, we conclude that this result does not impact our analysis of motions to vacate under § 10.

The language giving rise to the argument that an underlying federal question is sufficient for federal jurisdiction under § 4 is absent from § 10. Section 10 does not state that a party "may petition any United States district court which, save for [the arbitration] agreement, would have jurisdiction under Title 28," to vacate an arbitration award. And we see no reason to artificially import the language into § 10, since we do not believe it is necessarily anomalous for Congress to have intended that federal courts take jurisdiction for purposes of a motion to compel where the underlying dispute is federal, but not take jurisdiction on a parallel motion to vacate. The primary purpose of the Arbitration Act was "to reverse the centuries of judicial hostility to arbitration agreements, by plac[ing] arbitration agreements upon the same footing as other con-

tracts." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 225-26 (1987) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974). The central federal interest was enforcement of agreements to arbitrate, not review of arbitration decisions. Thus it would be reasonable for Congress to give federal courts the responsibility of ensuring arbitration agreements are upheld in cases where the courts would otherwise have jurisdiction. However, once the arbitration agreement is enforced, there exists no compelling need for the federal courts to be involved, unless a federal question is actually at issue or diversity is established. The central goal of the FAA will already have been addressed, and well-established rules of federal jurisdiction, including the well-pleaded complaint rule, should govern. Accordingly, merely because a district court may have jurisdiction over a motion to compel arbitration where an underlying federal question is at stake (an issue we do not decide today) does not mean the same holds true in the context of a § 10 motion to vacate. We simply hold that a district court has subject matter jurisdiction over a petition to vacate an arbitration award pursuant to 9 U.S.C. § 10 only where diversity of citizenship exists or the motion discloses a federal question on its face.[3]

For the foregoing reasons we AFFIRM the district court's dismissal of Minor's motion to vacate.

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[3] We note that dicta in our opinion in *Comprehensive Accounting Corp. v. Rudell*, 760 F.2d 138, 140 (7th Cir. 1985), is not to the contrary, as in that case jurisdiction over the motion to confirm under § 9 was necessarily based on diversity of citizenship.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JO MINOR,	)	
	)	
Plaintiff	)	
	)	
v.	)	No. 95 C 2938
	)	
PRUDENTIAL SECURITIES, INC., et al	)	
	)	
	)	
Defendants	)	

MEMORANDUM OPINION

This case comes before this Court on the Defendants' "Motion to Dismiss Pursuant to Rule 12 for Lack of Subject Matter Jurisdiction or Alternatively to Dismiss on the Face of the Pleadings." The parties have fully briefed this issue. After considering all the arguments raised in the briefs, this Court holds that we lack subject matter jurisdiction to consider the Plaintiff's motion to vacate the arbitration award. Accordingly, the Defendants' motion to dismiss is granted.

I. BACKGROUND

This case arises from a series of stock investments by the Plaintiff, Jo Minor (Minor), through a brokerage firm, Prudential Securities, Inc. (Prudential). As result of these investments, Minor lost $17,797.86, which she then sought to recover. Pursuant to a clause in the brokerage agreement, Minor was obligated to file a claim with the National Association of Securities Dealers Arbitration Division. She filed her claim against Prudential and Patricia Mackie, a Prudential agent,

alleging nine counts: 1) breach of fiduciary relations; 2) breach of contract; 3) fraud; 4) constructive fraud; 5) lack of due care in performing contract; 6) violation of the Illinois Securities Act; 7) violation of the Securities Act of 1934; 8) use of racketeering income to operate an enterprise in violation of 18 U.S.C. § 1962(a); and 9) indirect participation in the conduct of racketeering enterprise's affairs in violation of 18 U.S.C. § 1962(c).

During the arbitration proceedings, a dispute arose regarding the Defendants' expert witnesses. One day prior to the hearing, the Defendants changed their handwriting expert. The Plaintiff objected to the switch, suggesting that Defendants were attempting to conceal a damaging report by their previously retained expert, Steven Cane. The Plaintiff filed a motion to compel the Defendants to produce the Steven Cane report and all correspondence relating to the retention of Steven Cane and Jim Hayes as experts. Following a telephone hearing, the Chairman of the arbitration panel ("Panel") held that the Plaintiff was entitled to the engagement letter to Cane and a copy of the Cane report. However, he denied the Plaintiff's request to obtain all the correspondence surrounding the hiring of the experts based on relevancy and materiality grounds.

Following the proceedings, the Panel noted that the Plaintiff had withdrawn her RICO claims and found for the Defendants on the remaining counts. On April 18, 1995, following a request by the Plaintiff, the Panel provided its findings and reasoning. On May 16, 1995, the Plaintiff filed her "Motion to Vacate Arbitration Award." In her motion, Minor alleges that the arbitration award should be vacated because: 1) it was procured by "corruption, fraud, or undue means"; 2) the panel refused to hear evidence pertinent and material to the controversy; 3) there was "evident partiality" in the panel; and 4) the award was imperfectly executed because the panel wrongly stated that the plaintiff had withdrawn her RICO counts.

II. DISCUSSION

Federal courts may only adjudicate cases which fall within the jurisdiction conferred by Article III of the United States Constitution. See *New Orleans Pub. Serv. Inc. v. Council of New Orleans*, 491 U.S. 350, 359 (1989). Accordingly, a federal court must determine whether jurisdiction exists before examining the merits. On a motion to dismiss for lack of subject matter jurisdiction, the party alleging jurisdiction bears the burden of demonstrating subject matter jurisdiction. *Western Transp. Co. v. Couzens Warehouse Distrib., Inc.*, 695 F.2d 1033, 1038 (7th Cir. 1982); *Grafon Corp. v. Hauserman*, 602 F.2d 781, 783 (7th Cir. 1979). To this end, the Plaintiff claims that this Court has jurisdiction based on 28 U.S.C. § 1331 (general federal question jurisdiction), 15 U.S.C. § 78j(b) (Securities Exchanges Act of 1934), and 18 U.S.C. §1961 (Racketeer Influenced Corrupt Organizations Act). The Defendants counter that this Court lacks subject matter jurisdiction to address the Plaintiff's motion to vacate pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §10, because there is neither diversity nor federal question jurisdiction. After review of the caselaw, we find that we lack subject matter jurisdiction to address the Plaintiff's motion.

The Federal Arbitration Act itself does not confer subject matter jurisdiction. The Supreme Court has stated that:

> [t]he Arbitration Act is something of an anomaly in the field of federal court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create an independent federal-question jurisdiction under 28 U.S.C. § 1331 or otherwise.

Moses H. Cone Hospital v. Mercury Constr. Corp., 460 U.S. 1, 25, n.32 (1983). Since the FAA could not provide jurisdiction, an additional basis for federal jurisdiction was required. Following *Moses H. Cone Hospital*, there was initially some

dispute as to whether the independent jurisdictional grant requirement applied to all sections of the Federal Arbitration Act. However, it is now well-established that § 10 of the Federal Arbitration Act[1] does not constitute a grant of subject matter jurisdiction and requires some showing of an independent jurisdictional basis. See *Ford v. Hamilton Investments, Inc.*, 29 F.3d 255, 257 (6th Cir. 1994); *Garrett v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 882, 884 (9th Cir. 1993); *Harry Hoffman Printing Inc. v. Graphic Communication, Int'l. Union, Local 261*, 912 F.2d 608, 611 (2d Cir. 1990). Therefore, a party must state an independent basis for federal jurisdiction, either by demonstrating diversity or invoking federal question jurisdiction.

It is undisputed that there is no diversity jurisdiction in this case. As the Defendants note in their motion to dismiss, the Plaintiff is an Illinois citizen, as is one of the Defendants,

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[1] Section 10 of the FAA, in relevant part, states:

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration –

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Patricia Mackie. As diversity is lacking, this Court may only address the Plaintiff's motion if there is federal question jurisdiction. Such jurisdiction arises when a "well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd. v. Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983). " Merely referring to a federal statute, however, does not establish federal jurisdiction if the dispute does not involve 'a substantial question of federal law'" *Ford v. Hamilton Investments, Inc.*, 29 F.3d at 258 (citing *Franchise Tax Bd.*, 463 U.S. at 28). Since the FAA clearly does not establish an independent cause of action, this Court must determine whether the Plaintiff's motion to vacate depends on the "resolution of a substantial question of federal law." We find that it does not.

Federal subject matter jurisdiction must be asserted in the complaint. The well-pleaded complaint rule requires that federal jurisdiction must be disclosed on the face of the complaint, unaided by the answer. *Phillips Petroleum Co. v. Texaco Inc.*, 415 U.S. 125, 127-28 (1974). This Court, therefore, must examine the jurisdictional bases presented in Minor's motion to vacate.[2] In her motion, Minor specifically claims that this Court

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[2] The well-pleaded complaint rule normally refers to the complaint, which is the initial documents filed in federal court. However in arbitration proceedings, the initial document often is a motion to confirm or vacate an award. See *O.R. Securities, Inc. v. Professional Planning Associates, Inc.*, 857 F.2d 742, 746 (11th Cir. 1988) ("The policy of expedited judicial action expressed in ...the Federal Arbitration Act... would not be served by permitting parties who have lost in the arbitration process to file new suit in federal court. The proper procedure ...is for the party seeking to vacate an arbitration award to file a Motion to Vacate in the district court.") . Therefore, since the well-pleaded complaint rule requires federal jurisdiction to be

(continued...)

has jurisdiction on two grounds: 1) the Securities Exchange Act of 1934 and 2) RICO.

In invoking the Securities Exchange Act and RICO, the Plaintiff relies on the subject matter of the underlying dispute to support federal question jurisdiction over her motion to vacate. However, merely referring to the Securities Exchange and RICO Acts in the motion to vacate is insufficient to confer subject matter jurisdiction. Minor's motion requests that this Court vacate the award because it was procured by "corruption, fraud, or undue means." Specifically, Minor alleges that the defendants hindered the discovery process and as a result affected the outcome. Minor's motion does not request that this Court decide or address underlying federal laws. It raises no securities or RICO issues for this Court to decide. While we acknowledge the seriousness of Minor's allegations of fraud, merely referring to the Securities Exchange Act and RICO, the subject matter of the underlying dispute, is insufficient to confer this Court with subject matter jurisdiction. See *Ford v. Hamilton Investments*, 29 F.3d at 258-59 (dismissing the case for lack of subject matter jurisdiction because the complaint, which requested vacating the award, relied solely on Michigan law and the National Association of Securities Dealers Rules as the jurisdictional bases and therefore failed to disclosed a federal question); *Garrett*, 7 F.3d at 884, n.3 (finding that citing the Securities Exchange Act in the petition to vacate an award did not support federal subject matter jurisdiction to vacate an award in favor of an employer on a wrongful termination claim). See also *Kaplan v. Dean Witter Reynolds, Inc. et al.*, 896 F.Supp. 1219, 1219-20 (S.D. Fla. 1995) (finding that an underlying securities claim was insufficient to establish federal question jurisdiction when the petition to vacate was only grounded on the FAA); *O'Leary v. Fanghella*,

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2(...continued)
adequately asserted in the initial document submitted to federal court, this Court must examine the jurisdictional grounds claimed in the motion to vacate.

866 F. Supp. 1119, 1120-21 (N.D. Ill.1994); *Giagrande v. Pearson Lehman/E.F. Hutton*, 803 F. Supp. 464, 468 (D. Mass. 1992); *Klein v. Drexel Burnham Lambert, Inc*, 737 F. Supp. 319, 324 (E. D. Pa. 1990).

Additionally, Minor claims that she was denied a "fair hearing" because the arbitration panel failed to hear pertinent evidence. This "fair hearing" assertion also fails to establish federal question jurisdiction. Minor's contention is that the panel did not hear certain relevant evidence which is impermissible under § 10 of the FAA. As discussed above, the FAA cannot be an independent basis for federal question jurisdiction. Thus, Minor does not have an independent jurisdictional basis for her motion to vacate.

This Court acknowledges that in a footnote in her response, Minor claims that her motion to vacate "raises on its face issues of a 'fair hearing' under the Due Process Clause of the U.S. Constitution". Since her motion to vacate does not refer to the Due Process Clause or the Constitution and only discusses a "fair hearing" in the context of the FAA, we find that Minor's original motion did not state the Due Process Clause as a basis for jurisdiction.

In the same footnote, Minor states that should this court not construe her "fair hearing" assertion as a due process claim, she seeks leave to amend " to specifically.. set out the constitutional basis for her claim." This Court grants the Plaintiff leave to amend. Awhile we need not decide the merits of her claim, we would like to note that any due process claim would face substantial hurdles. First, the arbitration panel appears to be a private entity, which prohibits any due process claim. *Elmore v. Chicago & Illinois Midland Ry. Co.*, 782 F.2d 94, 96 (7th Cir. 1986) ("the fact that a private arbitrator denies the procedural safeguards that are encompassed by the term "due process of law" cannot give rise to a constitutional complaint."). Second, since the panel allegedly violated Minor's right to due process, Prudential Securities and Patricia Mackie, the Defendants in the

current case, would be improper parties. This Court would take a dim view toward any amended complaint which did not overcome these obstacles; such a complaint would be meritless and might warrant sanctions.

III. CONCLUSION

For the reasons discussed above, this Court finds that it lacks subject matter jurisdiction to address the Plaintiff's motion to vacate. Accordingly, we grant the Defendants' motion to dismiss under Federal Rule of Civil Procedure 12 (b) (1).

ENTERED:

December 26, 1995

BRIAN BARNETT DUFF, JUDGE
UNITED STATES DISTRICT COURT

ARBITRATION 9 U.S.C.§ 1

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.
July 30, 1947, c.392, 61 Stat.670.

Historical Note
Derivation. Act Feb 12, 1925, c. 213, § 43 Stat. 883.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration of the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall

proceed summarily to the trail thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

§ 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

§ 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by the law for making and hearing of motions, except as otherwise herein expressly provided.

§ 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

§ 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction

to direct the parties to proceed with the arbitration and shall retain jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§ 10. Same, vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(b) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

§11. Same; modification or correction; grounds; order

In either of the following cases United States court in and for the district wherein the award was made may make and order modifying or correcting the awards upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

§12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

§ 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

§ 14. Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.

Supreme Court, U.S.
FILED
JAN 8 1997
CLERK

No. 96-914

In The

Supreme Court of the United States

October Term, 1996

JO MINOR,

Petitioner,

vs.

PRUDENTIAL SECURITIES, INC. and PATRICE MACKIE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTIONS PRESENTED

The two questions presented by petitioner are inappropriate under the criteria outlined in Rule 10 of the Supreme Court Rules, since they are not implicated by the record below. The record below does support the following questions:

1. Whether the Federal Arbitration Act — which provides that "the United States court in and for the district wherein the award was made may make an order vacating the award" — means instead that unless a case was already pending there, a United States court may *only* make such an order in diversity cases.

2. Is a federal question presented for purposes of federal jurisdiction under 28 U.S.C. § 1331 solely because the arbitration underlying the petition to vacate included federal claims.[1]

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1. In accordance with Supreme Court Rule 29.6, respondent Prudential Securities Incorporated states that it is a Delaware corporation with its principal place of business in New York, New York. Prudential is a wholly owned subsidiary of the Prudential Insurance Company of America.

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9 U.S.C. § 11	5, 7
9 U.S.C. § 12	8
28 U.S.C. § 1331	i, 2, 4
28 U.S.C. § 1332	2, 3
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Supreme Court Rule 10	i

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COUNTER STATEMENT OF THE CASE

In accordance with Supreme Court Rule 15.2, a Counter Statement of the Case is necessary because the Petition recites as "fact" many assertions which are not part of the record, were not considered below and, in part, are factually untrue. Contrary to the impression conveyed by the Petition, the underlying facts and circumstances are simple, straightforward and should not be controversial:

Jo Minor ("Minor") was a securities customer of Prudential Securities Incorporated ("Prudential"), a broker-dealer; her broker was Patrice Mackie ("Mackie"). On December 6, 1993, Minor filed a claim in arbitration before the National Association of Securities Dealers, Inc. against Prudential and Mackie. Prudential and Minor were subject to a pre-dispute arbitration agreement contained in Minor's securities account agreement with Prudential.

Minor's arbitration Claim asserted nine different counts including alleged violations of the state and federal securities laws, common law tort, common law contract and "RICO." Although the RICO claim was withdrawn prior to the hearing, Minor's securities fraud claims under the Securities Exchange Act of 1934 were heard by the Arbitrators.

Prudential and Mackie denied the claims, and, after a protracted hearing, the Arbitrators denied Minor's claims in their entirety and entered an award dismissing each claim. Thereafter, Minor sought and received an extraordinary "Statement of Reasons" from the Arbitrators explaining the reasons for the denial of her claims.[2] Minor, nonetheless, states in her Petition

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2. The Statement of Reasons provided by the Arbitrators, in fact, belies the same precise allegations which later became the factual assertions in (Cont'd)

that certain documents and putative testimony (concerning the alleged forgery of her new account agreement) were hidden from, and/or ignored by, the Arbitrators. In fact, her specific claims of procedural wrongdoing were presented to the Arbitrators and she received additional discovery because of them. Her substantive claims were, however, subsequently denied on the merits.

On February 7, 1995, Minor filed a Petition to Vacate the Arbitration Award in the United States District Court for the Northern District of Illinois. Prudential and Mackie asserted a Motion to Dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure for lack of federal subject matter jurisdiction. On December 26, 1995, Judge Brian Barnett Duff granted that Motion and dismissed Minor's Complaint. Thereafter, on March 3, 1996, Minor appealed that decision to the United States Court of Appeals for the Seventh Circuit which, on September 4, 1996, denied the appeal. This Petition followed.

REASONS FOR DENYING THE WRIT

The Court of Appeals' decision does not present any question which warrants review by this Court. That decision reaffirmed and applied well-settled authority that, although the Federal Arbitration Act (the "Act") evidences a strong federal policy favoring enforcement of agreements to arbitrate, the Act is not, itself, a basis for federal jurisdiction. Rather, in order for an arbitral dispute to be heard in federal court, either diversity jurisdiction, under 28 U.S.C. § 1332, or federal question jurisdiction, under 28 U.S.C. § 1331, must be present in the petition which is submitted to the court for decision.

(Cont'd)

Minor's Petition to Vacate. The Arbitration Award and the Arbitrators' Statement of Reasons are set forth in the Appendix to this Brief, as Appendix A and B, respectively.

A petition to vacate an arbitration award, ultimately, implicates only Section 10 of the Act, even if the underlying arbitration included federal questions. The "reviewing court" does not review the award to determine if it agrees with the arbitrators' assessments and findings of fact and any explicit or implicit conclusions of law. Rather, the review is solely to determine if a violation of the standards set forth in Section 10 of the Act has occurred. Accordingly, a petition to vacate an arbitration award may only be heard in federal court if (i) there is diversity jurisdiction under 28 U.S.C. § 1332 or (ii) there was a prior lawsuit in that court which addressed a motion to compel arbitration of the underlying dispute.

I.

A PETITION TO VACATE AN ARBITRATION AWARD MUST SUPPLY AN INDEPENDENT BASIS OF FEDERAL JURISDICTION.

It is well settled that the Act, although a federal statute embodying a strong federal policy favoring enforcement of agreements to arbitrate, does not supply an independent basis for federal jurisdiction:

> The Arbitration Act is something of an anomaly in the field of federal court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create an independent federal question jurisdiction under 28 U.S.C. 1331 or otherwise.

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 25 n. 32 (1983); *see also Southland Corp. v. Keating*, 465 U.S. 1, 9-11 (1984).

When a court reviews a petition under the Act, the issue which it is being called upon to decide (in the absence of diversity among the parties) determines whether federal question jurisdiction under 28 U.S.C. § 1331 is present. If the court is being asked to determine if an arbitration award was, for example, "procured by fraud," it is not considering or determining a federal statute. On the other hand, if it is being asked to stay and compel arbitration of a lawsuit which alleges violations of the Securities Exchange Act of 1934, the lawsuit was already properly in federal court pursuant to 28 U.S.C. § 1331.

Contrary to Minor's argument, this Court, as well as the Courts of Appeals for the various circuits and all reviewing District Courts, have interpreted the Act consistently and have opined contrary to the position which Minor asserts in her Petition. As discussed above, the Act creates a body of federal substantive law favoring enforcement of arbitration agreements which must be enforced by state and federal courts alike; but, it does not itself create federal question jurisdiction.

Minor misapplies a familiar doctrine, the "well pleaded complaint rule," in her argument that federal question jurisdiction is present any time that a court is called upon to consider a post-arbitration petition under the Act, so long as the underlying arbitration involved federal claims. This is incorrect: When a United States District Court considers either a motion to dismiss for lack of subject matter jurisdiction or a removal petition, under 28 U.S.C. § 1441, it looks not to the answer or to the removal petition to determine if federal question jurisdiction is present, but to the underlying complaint. This is because the court will be called upon, should the motion to dismiss be unsuccessful (or the removal petition successful), to decide the issues presented in the complaint.

However, when considering a petition to vacate an arbitration award under the Act, the court will consider only the matters alleged in the petition to vacate in order to determine if Section 10 of the Act had been violated. The court will not consider or determine the substantive issues contained in the underlying arbitration. The Court of Appeals for the Second Circuit recently confirmed this analysis in a case involving Section 4 of the Act. *Westmoreland Capital Corporation v. Findlay, et al.*, 100 F.3d 263 (2d Cir. 1996).

This Court has recognized that neither the Act nor its legislative history are entirely clear. *Southland*, 465 U.S. at 12. Lower federal courts have also noted these ambiguities. *Merrill Lynch, Pierce, Fenner & Smith v. Lauer*, 49 F.3d 323, 329 (7th Cir. 1995) (referring to a "sketchy and incomplete" legislative history); *Harry Hoffman Printing, Inc. v. Graphic Communications, Int'l. Union, Local 261*, 912 F.2d 608, 611 (2d Cir. 1990) ("This language [referring to Section 10 of the Act] is less than precise. . . ."); *Drexel Burnham Lambert, Inc. v. Valenzuela Bock*, 696 F. Supp. 957, 960 (S.D.N.Y. 1988) ("The problem is, in part, one of bad statutory drafting .. . [referring to the use of the term 'the United States court' in the Act]").

The absence of a lengthy or clear legislative history does not mean, however, that the various courts have ruled inconsistently. Petitions under Sections 3 and 4 of the Act *are* treated differently than petitions under Section 9, 10 and 11, but not because the courts have acted and ruled inconsistently. Rather the courts have created a single *de facto* test: Whether the issue for the court to decide (whether contained in a petition to compel arbitration or a petition to vacate an arbitration award) substantially involves a federal question. In fact, the Second Circuit, in *Westmoreland*, recently concluded that Sections 4, 9 and 10 of the Act are treated in the same manner:

> If the language of FAA § 4 were interpreted to give federal courts jurisdiction to compel arbitration whenever the underlying claim involves a federal question, this would produce an odd distinction: a petition to compel arbitration could be brought in federal court, but a petition under FAA §§ 9 or 10 to confirm or vacate the arbitration award in the same dispute could not. This distinction would truly be "bizarre". . . .

Westmoreland, 100 F.3d at 268.

When reviewing a petition to compel arbitration, the reviewing court must determine from the underlying complaint if there is a basis for federal jurisdiction. The petition does not independently supply a grant of federal jurisdiction. No such analysis is required in connection with a petition to vacate, as the only substantive inquiry is whether the arbitration was conducted (and any award obtained) in violation of the standards set forth in Section 10 of the Act. *Harry Hoffman*, 912 F.2d at 611; *City of Detroit Pension Fund v. Prudential Securities, Incorporated,* 91 F.3d 26, 29 (6th Cir. 1996); *Ford v. Hamilton Investments, Inc.*, 29 F.3d 255, 257-58 (6th Cir. 1994); *Merit Insurance Company v. Leatherby Insurance Co.*, 714 F.2d 673 (7th Cir. 1983).

II.

THE PURPOSE OF THE ACT IS NOT TO REVIEW ARBITRATION AWARDS.

On numerous occasions, this Court has considered the legislative history of the Act. It is well-settled: "First, the basic purpose of the Federal Arbitration Act is to overcome courts'

refusals to enforce agreements to arbitrate." *Allied-Bruce Terminix Companies, Inc. v. Dobson,* 513 U.S. __, 130 L. Ed. 2d. 753, 762, 115 S. Ct. __ (1995); *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 510-11 (1974); *Shearson/American Express Inc. v. McMahon,* 482 U.S. 220, 225-26 (1987) :

> Congress' clear intent in the Arbitration Act was to move the parties to an arbitral dispute out of court and into arbitration as quickly and easily as possible.

Moses H. Cone, 460 U.S. at 22 (1983).

Conversely, the purpose of the Act was **not** to create new federal court jurisdiction merely because an arbitration agreement was involved. "Congress has given the lower courts jurisdiction to hear only those cases in which the plaintiff's right to relief necessarily depends on substantial question of federal law." *Franchise Tax Board v. Laborers Vac. Trust,* 463 U.S. 1, 27-28 (1983); *see also Moses H. Cone,* 460 U.S. at 24 (1983).

Accordingly, although the Act does provide, in Sections 9, 10 and 11, a statutory basis on which to petition a court of competent jurisdiction to affirm, vacate or modify an arbitration award, such petitions do not, of themselves, implicate the purpose of the Act. In this respect, a federal court's jurisdiction to hear a post-arbitration petition rests on principles of judicial economy and should be viewed in the same context as a United States District Court considering a complaint which consists solely of pendant state law claims after any federal claims have been dismissed.

Under *United Mine Workers of America v. Gibbs,* 383 U.S. 715 (1966), once the federal court has dismissed all federal law claims, it has discretion to retain jurisdiction to hear pendant

state law claims only when the case has advanced substantially and the court has invested time in connection with the merits of the case. In context, in the absence of diversity jurisdiction, a petition to vacate (or one to confirm or modify) an arbitration award may only be heard in a federal court if a case was already properly brought in that court and a motion to compel arbitration pursuant to Sections 3 or 4 of the Act had been previously granted.

It is equally well-settled that Sections 3 and 4 of the Act do not provide an independent basis of federal jurisdiction. "Hence there must be diversity of citizenship or some other independent basis for federal jurisdiction before the order can issue." *Moses H. Cone,* 460 U.S. at 25, n. 32. Petitioner cites *Harry Hoffman,* 912 F.2d at 611, n.1, but misses the point:

> [I]t would be anomalous to conclude, for example, that Section 4 confers no jurisdiction to compel arbitration, but that Section 10 confers jurisdiction to vacate an award once arbitration has taken place.

Harry Hoffmann stands for the proposition that the petition which the court will consider on the merits must include an independent basis of federal jurisdiction.

Moreover, it is highly unlikely that, in 1925, Congress intended Sections 9 and 10 and of the Act to constitute both *in personam* jurisdiction over a defendant as well as federal court subject matter jurisdiction. Under Section 12 of the Act (which supplies the procedural requirements for all post-arbitration petitions), service of the petition may be made on "the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court." It would be unprecedented and extraordinary for parties to arbitrations to

be able to obtain *in personam* jurisdiction over the adverse party by serving the attorney who represented that individual in an earlier arbitration proceeding but where there had been no prior judicial proceedings.

On balance, it is clear that Congress, in providing for post-arbitration judicial proceedings, necessarily assumed that a prior action had been pending in the same court prior to the arbitration underlying the petition in question. The entire procedural structure, including treating the petition as a motion and providing for service on the opposing party by serving his attorney, confirms this construction: "A court [that] orders arbitration retains jurisdiction to determine any subsequent application involving the same agreement to arbitrate, including a motion to confirm [or vacate] the award." *Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698, 705 (2d Cir. 1985), *cert. denied*, 475 U.S. 1067 (1986); *see also Harry Hoffman*, 912 F.2d at 611.

Ultimately, as the Seventh Circuit has held in connection with this and with other cases, post-arbitration petitions, such as this Petition to Vacate, do not raise the policy concerns which underlie Congress' enactment of the Act. *Lauer*, 49 F.3d at 330 (7th Cir. 1995).

CONCLUSION

For the foregoing reasons and controlling authorities, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — ARBITRATION AWARD

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

93-05044

Name of Claimant

Jo Minor

Name of Respondents

Prudential Securities, Inc. and Patrice A. Mackie

REPRESENTATION OF PARTIES

Claimant Jo Minor ("Minor") was represented at the hearing by Henry Field, Esq. of the Law Offices of Henry Field, Ltd., Chicago, Illinois.

Respondent Prudential Securities, Inc. ("Prudential") was represented at the hearing by Christopher M. Mone, Esq. of Prudential Securities, Inc., New York, New York.

Respondent Patrice Mackie ("Mackie") was represented at the hearing by co-counsel to Christopher Mone, William Holland, Esq. of Holland and Holland, Chicago, Illinois.

CASE INFORMATION

Statement of Claim filed on December 6, 1993. Response to Respondent's Motion to Dismiss the claim filed on or about March 24, 1994. Claimants' Submission Agreement signed on November 26, 1993.

Appendix A

Joint Statement of Answer and Motion to Dismiss filed by Respondents Prudential and Mackie on February 2, 1994.

Respondent, Prudential's Submission Agreement signed on July 20, 1994. Respondent, Mackie's Submission Agreement signed on July 13, 1994.

HEARING INFORMATION

Prehearing conferences were held on October 5, 1994 for one (1) session, December 2, 1994 for one (1) session, and on January 9, 1995 for one (1) session.

The hearings were held on December 14, 1994 for two (2) sessions, December 15, 1994 for two (2) sessions, and on January 17, 1995 for two (2) sessions in Chicago, Illinois.

CASE SUMMARY

Claimant Minor alleged the following Counts as her Statement of Claim: Count I, Breach of Fiduciary Relations, Count II, Breach of Contract, Count III, Fraud, Count IV, Constructive Fraud, Count V, Lack of Due Care in Performing Contract, Count VI, Illinois Securities Act, Count VII, Securities Act of 1934, Count VIII, RICO, 1962(a), Count IX, RICO, 1962(c).

Claimant further alleged in her Statement of Claim that Respondents Prudential and Mackie recommended high-risk investments such as Centocor, Inc., LSI Logic Corporation, and Glaxo Holdings, while representing that they were safe, forged Minor's signature on the Client Agreement, and engaged in at least one unauthorized trade. Claimant Minor also alleged that Prudential failed to supervise Mackie.

Appendix A

Respondents Prudential and Mackie (collectively "Respondents") in their joint Statement of Answer and Motion To Dismiss stated that Minor must be barred from pursuing her claim with respect to her purchase of Centocor, Inc. since she chose to participate in the Centocor class action. Respondents denied the allegations set forth in the Statement of Claim. Respondents stated that Minor was a sophisticated investor and was advised of any risks involved. Respondents also stated that Minor chose to purchase Centocor after Mackie recommended a selection of stocks, including Centocor. Respondents stated that Minor's name was not forged on the Client Agreement and that the burden of proof is Minor's responsibility.

Claimant Minor, in her Reply to the Motion to Dismiss stated that there are no duplicative claims. In Respondents Response to the Reply, Respondents stated that Minor's claim is not eligible for arbitration since she is a member of the Centocor class action.

RELIEF REQUESTED

Claimant requested compensatory damages in the amount of her loss ($17,797.86), plus interest from January 1, 1992 to the date of the award, treble damages amounting to $53,393.58, plus interest pursuant to 18 U.S.C., Section 1964(c), attorneys fees, filing fees and costs, and such other and further relief as claimant may request or the panel may order.

Respondents requested that the Statement of Claim be dismissed in its entirety.

OTHER ISSUES CONSIDERED AND DECIDED

The NASD administratively denied Respondent's Motion to

Appendix A

Dismiss based on Section 12(d)(2) of the NASD Code of Arbitration Procedure and stated that the parties may re-raise the issue with the panel. The motion was re-raised with the panel but subsequently denied.

Count VIII and Count IX of the Statement of Claim were withdrawn prior to hearing by Claimant.

The parties have agreed that the Award in this matter may be executed by counterpart copies or that a handwritten, signed Award may be entered. In either case, the parties have agreed to receive conformed copies of the Award while the originals remain on file with the NASD.

AWARD

After considering the pleadings, the testimony, and the evidence presented at the hearing, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Count I: The panel finds no breach of fiduciary relation;

   Count II: The panel finds no breach of contract;

   Count III: The panel finds no proof of constructive fraud;

   Count IV: The panel finds no proof of professional negligence;

   Count V: The panel finds no violation of professional negligence;

Appendix A

Count VI: The panel finds no violation of the Illinois Securities Act;

Count VII: The panel finds no violation of the Federal Securities Act;

Count VIII and Count IX were withdrawn prior to hearing;

2. Claimant's request for interest is denied;

3. Claimant's request for treble damages is denied;

4. Each of the parties shall bear their own costs and expenses, including attorney's fees, other than those specifically enumerated for under Forum Fees below.

FORUM FEES

Pursuant to Section 43(c) of the NASD Code of Arbitration Procedure, the following forum fees are assessed:

6 hearing sessions x $1000 = $6000 plus three (3) prehearing conference sessions x $300 = $900 equals net $6900 due to the NASD.

Pursuant to Section 43(c) of the Code, the NASD shall retain the nonrefundable filing fee in the amount of $250 previously deposited by Claimant.

The panel has ordered that Claimant, Jo Minor, pay the additional forum fees in the sum of $6900 to the NASD.

Appendix A

Additional forum fees assessed by the panel are payable to the National Association of Securities Dealers, Inc.

By the Arbitration Panel:

Dated:

2/28/95	s/s Richard L. Merrick Richard L. Merrick, Esq. Presiding, Public Arbitrator
3/1/95	s/s Michael F. Jordan Michael F. Jordan, Esq. Public Arbitrator
2/27/95	s/s Marc Horin Marc B. Horin Industry Arbitrator

Date Award Served by the NASD: (for NASD use only) 3/9/95.

APPENDIX B — ARBITRATOR'S STATEMENT OF REASONS

NASD Arbitration

National Asociation of Securities Dealers, Inc. • 20th Floor • 10 South LaSalle Street • Chicago, IL 60603-1002 • 312-899-1110 FAX 312-236-9239

TO: All parties

FROM: Sharon A. Kranz, Staff Attorney

DATE: April 18, 1995

Subject: NASD Arbitration Number 93-05044
Jo Minor vs. Prudential Securities, Inc. and Patrice A. Mackie

By letter dated March 9, 1995, counsel for claimant requested a letter from the panel which would provide reasons for their results in the above-captioned matter. The NASD Code of Arbitration Procedure does not currently obligate arbitrators to provide their findings to the parties. However, the arbitrators may decide on their own accord to provide such reasoning.

The arbitrator's findings are as follows:

In essence the Award exemplified the fact that claimant did not establish facts which would justify relief.

Jo Minor executed a brokerage account agreement with Prudential by signing a cash account customer's form of contract. She did not intend to have a cash account and did not ever consider that she had a cash account. She always treated it as a

margin account. Possibly a majority of the proof offered by the complainant in the case related to a margin account form of customer's agreement bearing the handwritten name Jo Minor on the signature line. You had two contentions with respect to this form:

(a) It was not signed by Jo Minor nor by any authorized agent of Jo Minor, and;

(b) The purported signature was a forgery executed by Patrice Mackie.

With respect to proposition (a), Jo Minor testified that it is not her signature and that she did not authorize anybody to sign her name. Her expert testified that it is not Mrs. Minor's signature. The opposing expert testified that it could be her signature. Thus, the issue is not resolved to a certainty, but the weight of the evidence suggests that it is not the signature of Jo Minor nor of an authorized agent.

With respect to proposition (b), with the exception of the rather weak testimony of the complainant's expert, there is so little to support the suggestion that the writing is that of Patrice Mackie, plus the almost infinite possibilities of who might have written the name, that no conclusion can be reached as to who write it. Your expert was much less persuasive than the expert for the defense. In that respect, you failed to prove a major contention of your allegations. In other words, if forgery had been an essential element of your case, you would have failed because you did not have a preponderance of the evidence in support of your position.

Under questioning by the arbitration panel, you conceded

that even assuming, arguendo, that the writing was a forgery, Jo Minor was not harmed by it because she had wanted a margin account and thought that she had a margin account. The only effect of the second customer's agreement was to permit the account to be treated as a margin account by Prudential, which it and she had been doing already.

Your contention that Jo Minor was an unsophisticated elderly widow was refuted by her own testimony, by her income tax return, and by her long history of fairly active trading in speculative common stocks with a large number of regular and discount brokers. The fact that she had losses in her account at Prudential does not create a liability on the part of Prudential unless it violated a responsibility to Mrs. Minor. None was established.

cc: all arbitrators